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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 37 and 52

[FAC 2005-80; FAR Case 2014-008; Item II; Docket No. 2014-0008; Sequence No. 1]

RIN 9000-AM84

Federal Acquisition Regulation; Management and Oversight of the Acquisition of Services

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement a recommendation to strengthen guidance on service acquisitions on uncompensated overtime.

DATES: Effective: [Insert date 30 days after publication in the FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Mr. Michael O. Jackson, Procurement Analyst, at 202-208-4949 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202-501-4755. Please cite FAC 2005-80, FAR Case 2014-008.

SUPPLEMENTARY INFORMATION:

I. Background

Section 865 of the Ike Skelton National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2011 (Pub. L. 111-383) directed the Secretary of Defense to submit, in consultation with the Office of Federal Procurement Policy (OFPP) and all other relevant Federal agencies, a review of the Federal Acquisition Regulation (FAR) and Defense Federal Acquisition Regulations Supplement (DFARS), to ensure that they have appropriate guidance for service acquisitions. As a result, the regulatory drafting teams for the FAR and DFARS reviewed current regulations related to services and considered the extent to which improvements might be needed.

In November 2011, DoD issued a report entitled DoD Report to Congress on Federal Acquisition Regulation (FAR) and Defense Federal Acquisition Regulations Supplement (DFARS) Review Regarding Services Acquisition. This Report to Congress includes a series of recommendations on issues for strengthening existing guidance on services acquisition through addition, clarification, or expansion.

II. Analysis and Discussion

This FAR case implements a recommendation to create a definition of uncompensated overtime. Accordingly, the

existing definitions of "uncompensated overtime" and "uncompensated overtime rate" at FAR 52.237-10(a) have been incorporated at FAR 37.101, with the defined term "uncompensated overtime rate" changing to "adjusted hourly rate (including uncompensated overtime)." Additionally, the definition of the new term "adjusted hourly rate (including uncompensated overtime)" clarifies that the proposed hours per week include uncompensated overtime hours over and above the standard 40-hour work week. The clause at FAR 52.237-10 is further amended to clarify the application of the adjusted hourly rate, and categorization of proposed hours subject to the adjusted hourly rate. Finally, a change is made at FAR 37.115-2 to reflect the change made in the clause at FAR 52.237-10(b).

III. Publication of this final rule for public comment is not required by statute

"Publication of proposed regulations", 41 U.S.C. 1707, is the statute which applies to the publication of the Federal Acquisition Regulation. Paragraph (a)(1) of the statute requires that a procurement policy, regulation, procedure or form (including an amendment or modification thereof) must be published for public comment if it relates to the expenditure of appropriated funds, and has either a significant effect beyond the internal operating procedures

of the agency issuing the policy, regulation, procedure or form, or has a significant cost or administrative impact on contractors or offerors. This final rule is not required to be published for public comment, because it only clarifies policy that is already stated in the FAR. These proposed changes as described in section II of this preamble affect only the internal operating procedures of the Government.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Regulatory Flexibility Act

The Regulatory Flexibility Act does not apply to this rule because this final rule does not constitute a significant FAR revision within the meaning of FAR 1.501-1 and 41 U.S.C. 1707 does not require publication for public comment.

VI. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in CFR Parts 37 and 52

Government procurement.

Dated: January 22, 2015.

William Clark,
Director,
Office of Government-wide
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Office of Acquisition Policy,
Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 37 and 52 as set forth below:

1. The authority citation for 48 CFR parts 37 and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 37—SERVICE CONTRACTING

2. Amend section 37.101 by adding, in alphabetical order, the definitions "Adjusted hourly rate (including uncompensated overtime)" and "Uncompensated overtime" to read as follows:

37.101 Definitions.

* * * * *

Adjusted hourly rate (including uncompensated overtime) is the rate that results from multiplying the hourly rate for a 40-hour work week by 40, and then dividing by the proposed hours per week which includes uncompensated overtime hours over and above the standard 40-hour work week. For example, 45 hours proposed on a 40-hour work week basis at \$20 per hour would be converted to an uncompensated overtime rate of \$17.78 per hour ($\$20.00 \times 40 / 45 = \17.78).

* * * * *

Uncompensated overtime means the hours worked without additional compensation in excess of an average of 40 hours per week by direct charge employees who are exempt from the Fair Labor Standards Act. Compensated personal absences such as holidays, vacations, and sick leave shall be included in the normal work week for purposes of computing uncompensated overtime hours.

3. Amend section 37.115-2 by adding paragraph (d) to read as follows:

37.115-2 General policy.

* * * * *

(d) Whenever there is uncompensated overtime, the adjusted hourly rate (including uncompensated overtime) (see definition at 37.101), rather than the hourly rate, shall be applied to all proposed hours, whether regular or overtime hours.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

4. Amend section 52.237-10 by—
- a. Revising the date of the provision;
 - b. Removing from paragraph (a) the definition "Uncompensated overtime rate", and adding, in alphabetical order, the definition "Adjusted hourly rate (including uncompensated overtime)"; and
 - c. Revising paragraph (b).

The revisions and addition read as follows:

52.237-10 Identification of Uncompensated Overtime.

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**IDENTIFICATION OF UNCOMPENSATED OVERTIME [INSERT ABBREVIATED MONTH AND
YEAR 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**

(a) * * *

Adjusted hourly rate (including uncompensated overtime) is the rate that results from multiplying the hourly rate for a 40-hour work week by 40, and then dividing by the proposed hours per week which includes uncompensated overtime hours over and above the standard 40-hour work week. For example, 45 hours proposed on a 40-hour work week basis at \$20 per hour would be converted to an uncompensated overtime rate of \$17.78 per hour ($\20.00×40 divided by 45 = \$17.78).

* * * * *

(b)(1) Whenever there is uncompensated overtime, the adjusted hourly rate (including uncompensated overtime), rather than the hourly rate, shall be applied to all proposed hours, whether regular or overtime hours.

(2) All proposed labor hours subject to the adjusted hourly rate (including uncompensated overtime) shall be identified as either regular or overtime hours, by labor categories, and described at the same level of detail. This is applicable to all proposals whether the labor hours are at the prime or subcontract level. This includes uncompensated overtime hours that are in indirect cost pools for personnel whose regular hours are normally charged direct.

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[BILLING CODE 6820-EP]

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